In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-181

STATE ELECTRIC SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. The Board held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to abide by a contract negotiated and executed on its behalf by a multiemployer association.[1] In reaching this conclusion, the Board found that the Company had participated in the 1970-1971 contract negotiation until the final agreement was reached, but thereafter refused to adopt the executed contract, without, however, notifying either the Association or the Union[2] of its intent to withdraw from the multiemployer bargaining association (Add. App. 5, n. 4, 15). The court of appeals found that

---

[1] Panama City Electrical Contractors.

[2] Local Union 1001, International Brotherhood of Electrical Workers.

substantial evidence supported the Board's findings and enforced its order (Pet. App. 14). The Company filed a petition for rehearing contending that in *I.C. Refrigeration Service, Inc.*, 200 NLRB No. 107,[3] the Board had changed its position with respect to union acquiescence in employer withdrawal from multiemployer bargaining associations. Although the Company had never asserted in this case that the Union had acquiesced in its withdrawal (Add. App. 5), it contended that the court should reconsider the case in the light of *I.C. Refrigeration*. The court denied the petition (Pet. App. 23).

2. The sole question presented by the petition is whether the court of appeals abused its discretion in denying the petition for rehearing. This issue does not warrant review by this Court. As this Court has stated, "[t]he granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal." *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137. Accord: *Convoy* v. *First National Bank of Jersey City*, 203 U.S. 141, 145. And it is well settled that a court of appeals does not abuse its discretion by refusing to permit a party to raise new issues in a petition for rehearing. *United States* v. *Walton*, 411 F. 2d 283, 292 (C.A. 9); *Mitchell* v. *Greenough*, 100 F. 2d 1006 (C.A. 9), certiorari denied, 306 U.S. 659; *Marion Steam Shovel Co.* v. *Bertino*, 82 F. 2d 945, 946-947 (C.A. 8), certiorari denied, 299 U.S. 556. In fact, since the Company never raised acquiescence as a defense before the Board, it was precluded from raising it before the court by Section 10(e) of the Act, which provides: "No objection that has not been urged before

---

[3] *I.C. Refrigeration* was handed down subsequent to the instant Board proceeding, but prior to the filing of briefs in the court below.

the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253; *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322, and cases there cited.

3. In any event, *I.C. Refrigeration, supra*, represents no departure from prior Board standards on acquiescence. As the Company recognizes (Pet. 7), the Board has long held that a union may consent to an employer's withdrawal from a multiemployer association even after negotiations have begun. *Retail Associates, Inc.*, 120 NLRB 388, 395. Similarly, the Board has long recognized that a union may be deemed to acquiesce, or consent by implication, to an otherwise untimely withdrawal if its actions are "clearly antithetical" to its claim that the employer has not withdrawn. *The John J. Corbett Press, Inc.*, 163 NLRB 154, 158, enforcement granted, 401 F. 2d 673 (C.A. 2); *C & M Construction Co.*, 147 NLRB 843, 845. The decision in *I.C. Refrigeration, supra*, was merely a particularized application of these principles. It involved only the factual issue of whether the union's willingness to engage in individual bargaining with the recalcitrant employers indicated its acquiescence in their withdrawal from the multiemployer group. 200 NLRB No. 107 at slip op. 10. And see *Publicity Engravers, Inc.*, 161 NLRB 221, 227-228. Neither *I.C. Refrigeration* nor any other Board decision allows unilateral withdrawal without notification or acquiesence.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1973.